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Barbara J. Motes v. Preston J. Motes : Brief of Respondent

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

BARBARA J. MOTES, Plaintiff/Appellant, v. PRESTON J. MOTES, Defendant/Respondent Cross Appellant.	)	Case No. 88-0015-CA Priority No. 14b

RESPONDENT'S BRIEF

AN APPEAL FROM THE DECISION
OF THE THIRD JUDICIAL DISTRICT COURT,
OF AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE KENNETH RIGTRUP, JUDGE, PRESIDING

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IN THE COURT OF APPEALS

STATE OF UTAH

* * * * *

BARBARA J. MOTES, Plaintiff/Appellant, v. PRESTON J. MOTES, Defendant/Respondent Cross-Appellant.	CITATION OF SUPPLEMENTAL AUTHORITY Case No. 88-0015-CA Priority No. 14b

* * * * *

Respondent/Cross-Appellant submitted his brief on the 16th of August, 1988. Thereafter, he became aware of a decision of the Utah Supreme Court, Mortensen v. Mortensen, 89 Utah Adv. Reports 7, published on August 16, 1988. That decision is, respondent/cross-appellant believes, highly significant in regard to the issues presented to this court and, accordingly, pursuant to the provisions of Rule 24(j) of

the Rules of the Utah Court of Appeals, this authority is submitted to this court as supplemental authority dealing with Point III of respondent/cross-appellant's brief as set forth on pages 19 through 21.

In its pertinent point, the Utah Supreme Court in Mortensen v. Mortensen ruled that inherited property should be awarded to the spouse inheriting it during the course of the marriage, together with any appreciation or enhancement of its value, 89 Utah Adv. Reports at 9. However, the Court went on to declare

> . . . [U]nless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance or protection of that property, thereby acquiring an equitable interest in it.
> DuBois v. DuBois, supra, ...

It is the position of Respondent/Cross-Appellant that this is the exception that applied to the instant matter and the trial court erred in not finding that the efforts of the Cross-Appellant in managing the inherited property produced a substantial enhancement of that property in which he does have an equitable interest and which should have been awarded to him by the trial court.

RESPECTFULLY SUBMITTED this 29 day of September, 1988.

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true copy of the above and foregoing CITATION OF SUPPLEMENTAL AUTHORITY, this 29 day of September, 1988, to:

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JURISDICTIONAL STATEMENT

This is an appeal from the property distribution set forth in the Findings of Fact, Conclusions of Law and Decree of Divorce entered on December 21, 1987, in the Third Judicial District Court of Salt Lake County, State of Utah.

The Court of Appeals has jurisdiction to hear this matter pursuant to the provisions of Utah Code Ann. §78-2a-3(g)(1987) and Rule 3(a) of the Rules of the Utah Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. May a trial court postpone dividing a pension fund and permit one spouse to use the income from the pension for support when: (a) an immediate division of the pension would leave one spouse without sufficient income to provide support for himself or his children; and (b) the other spouse has sufficient income and financial resources to justify postponing division of the pension?

2. May a trial court order a custodial parent to execute documents necessary to permit the non-custodial parent to claim one or more of the parties' children as a tax exemption?

3. Did the trial court err in finding that both the plaintiff's inheritance and the appreciation on that inheritance were non-divisible, separate property although the appreciation was a result of the defendant's services?

4. Should either party be awarded costs and attorneys' fees incurred as a result of this appeal?

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS

26 U.S.C. §152(e)(1988):

(e) Support Test in Case of Child of Divorced Parents, etc.

(1) Custodial parent gets exemption.--Except as otherwise provided in this subsection, if--

(A) a child (as defined in *section 151(c)(3)*) receives over half of his support during the calendar year from his parents--

(i) who are divorced or legally separated under a decree of divorce or separate maintenance.

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) Exception where custodial parent releases claim to exemptions for the year.--A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the non-custodial parent if--

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the non-custodial parent attaches such written declaration to the noncustodial parent's return of the taxable year beginning during such calendar year.

For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

(3) Exception for multiple-support agreement. . . .

(4) Exception for certain pre-1985 instruments. . . .

(5) Special rule for support received from new spouse of parent. . . .

STATEMENT OF THE CASE

The instant case was initiated by plaintiff's Verified Complaint for Divorce, which was filed in the Third Judicial District Court of Salt Lake County, State of Utah on April 23, 1986. Defendant filed an Answer and Counterclaim for Divorce on March 19, 1987. The case was tried on July 30, 1987 before the Honorable Kenneth Rigtrup, Third District Court Judge. Defendant appeared in person and through counsel. Plaintiff appeared pro-se, as her counsel had withdrawn shortly before trial (R. 151; R. 239, Tr. July 30, 1987, at p. 3).

At the time of trial, the parties stipulated to division of the majority of household goods and personal property. In addition, the parties agreed to allege irreconcilable differences as the grounds for divorce and defendant agreed that custody of the parties' minor children could remain with the plaintiff.

The principle issues that were contested at trial include:

1. Division of the defendant's military retirement;
2. Division of the plaintiff's inheritance; and
3. Award of child support and alimony.

The parties were the only witnesses called at trial. Testimony relevant to the issues now on appeal established the following facts:

The defendant joined the United States Army, as a private, on June 21, 1960, and a year later obtained an appointment to the United States Military Academy at West Point (R. 239, Tr. July 30, 1987, at p. 66). The defendant graduated from the military academy in June of 1965 with a Bachelor of Science Degree in engineering (R. 239, Tr. July 30, 1987, at pp. 50-51). The parties were married on February 11, 1967, (R. 239, Tr. July 30, 1987, at p. 66). In 1977, while serving in the military, the defendant obtained a Masters of Business Administration from the University of Utah (R. 239, Tr. July 30, 1987, at p. 50).

Defendant retired from the military in June of 1984 (R. 239, Tr. July 30, 1987, at p. 66). Upon retirement, defendant began receiving monthly payments from his military pension, which net him approximately $1,149.00 per month (R. 239, Tr. July 30, 1987, at p. 67). After leaving the military, he began working in the area of financial planning (R. 239, Tr. July 30, 1987, at p. 69). Due to difficulties in establishing a clientele and generating a return on investments, at the time of the divorce the defendant's business was operating at a net monthly loss of income (R. 239, Tr. July 30, 1987, at pp. 90-91). The defendant's income also includes a monthly payment of $315.00 received pursuant to a contract for the sale of the parties' home in El Paso, Texas and approximately $11.83 per month in interest and dividends (R. 239, Tr. July 30, 1987, at p.

6). Thus, the defendant's net monthly income at the time of the divorce was approximately $1,475.83. The majority of that income is the income from the pension and, as the defendant testified, he needs that income to live (R. 239, Tr. July 27, 1987 at p. 72).

The plaintiff completed her nursing education and began working on her Master's Degree during the parties' marriage (R. 239, Tr. July 30, 1987, at p. 191). At the time of trial, she was taking non-credit courses and estimated, at that rate, it would take her five or six years to finish the Master's program (R. 239, Tr. July 30, 1987, at pp. 51-53). She started working for the University of Utah Medical Center in 1980. She is now a nursing supervisor at the University of Utah Medical Center, in charge of approximately 650 employees and she testified that her Master's training would assist her in advancing in her career (R. 239, Tr. July 30, 1987, at pp. 52-56). The plaintiff had a gross monthly income of $2,205.00 and a net income of approximately $1,745.00 (R. 239, Tr. July 30, 1987, at p. 6).

In December of 1985, the plaintiff inherited approximately $100,000.00 (R. 239, Tr. July 30, 1987, at p. 38). She gave $60,000.00 to the defendant to invest for the parties' children (R. 239, Tr. July 30, 1987, at p. 38). In February of 1985, plaintiff inherited approximately another $40,000.00 in cash (R. 239, Tr. July 30, 1987, at p. 41), and the defendant invested an additional $20,000.00. At the time of divorce, the $80,000.00 invested by the defendant had increased to $112,384.00; a gain of $32,384.00 (R. 239, Tr. July 30, 1987 at p. 39 and 49).

The parties separated in April of 1986. At the time of trial, plaintiff was 44 years of age and defendant was 45 (R. 239, Tr. July 30, 1987, at p. 5).

After hearing the parties' testimony, the trial court:

1. Ordered the defendant to pay child support of $175.00 per month for each of the parties' three minor children for a total of $525.00 (Findings and Conclusions at p. 6, para. 5; Decree at p. 6, para. 5).[1]

2. Awarded each party $1.00 per year as alimony (Findings and Conclusions at p. 7, para. 9; Decree at page 3, para. 9).

3. Ruled that both the $140,000.00 inherited by plaintiff and the $32,384.00 generated from the defendant's investment of the inheritance were not assets of the marital estate. Therefore the funds were not divided between the parties (Findings and Conclusions at p. 12 and 15, paras. 26 and 37; Decree at pp. 3 and 10-11, paras. 26 and 37).

4. Ruled that division of the retirement benefits accrued by both plaintiff and defendant is postponed until defendant's support obligation is satisfied--after the parties' last child reaches the age of majority or graduates from high school (Findings and Conclusions at page 14, para 35; Decree at p. 10, para. 35).

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[1]The Findings of Fact and Conclusions of Law entered in this case are pages 190-205 of the record on appeal. For the court's convenience, the Findings of Fact and Conclusions of Law are attached to this brief as Exhibit "A" and are cited herein as "Findings and Conclusions." The Decree of Divorce, record pages 206-219, is attached hereto as Exhibit "B" and cited as "Decree."

5. Ruled that defendant should be permitted to take a tax exemption for the parties' youngest child and, therefore, ordered the plaintiff to execute the documents necessary to permit the defendant to claim that exemption (Findings and Conclusions at page 7, para. 6; Decree at p. 2, para 6).

SUMMARY OF ARGUMENTS

POINT I

The trial court has broad discretion in fashioning division of a pension plan to facilitate an equitable division of property under the circumstances presented in each divorce proceeding. In the instant case, the income from the defendant's pension constitutes the majority of the defendant's income. Without that income, the defendant will be unable to support himself or his children while he tries to establish a new career. On the other hand, the plaintiff's income and other financial resources are sufficient to permit her to support herself and her children without the pension income. Consequently the trial court did not err in postponing division of the pension until his child support obligation terminates and allowing the defendant to use the pension income until that time.

POINT II

As a general rule, the custodial parent is entitled to claim his or her children as tax exemptions unless a statutory exception to that rule allows the non-custodial parent to claim the exemptions. 26 U.S.C. §152(e). One of the statutory exceptions provides that a non-custodial parent may claim the exemptions if

the custodial parent executes a written waiver of the exemptions. 26 U.S.C. §152(e)(2). Allowing a state court to order the custodial parent to execute such a waiver does not impair the goal behind the general rule, which is to relieve the Internal Revenue Service of the burden of having to resolve factual disputes between divorced parents to determine which is entitled to the exemptions. Further, if the state court makes its order conditional upon the non-custodial parent remaining current in child support, the order can further the interest of the state and the custodial parent in enforcing support obligations. Thus, a state court should be permitted to order a custodial parent to execute the waiver necessary to allow the non-custodial parent to claim a child as a tax exemption.

POINT III

The trial court has broad discretion in determining whether to consider one spouse's inheritance and the appreciation in that inheritance as property to be divided upon divorce when the other spouse did nothing to contribute to the appreciation. However, a spouse should not be discouraged from rendering services that will protect and enhance the other's inheritance by being denied any interest in the appreciation of the inheritance attributable to such services. Thus, the trial court erred in refusing to consider the appreciation in the plaintiff's inheritance that is attributable to the defendant's services.

POINT IV

Fees and costs on appeal should be granted under Utah Code Ann. §30-3-3(1984), when financial need of a party so dictates. In this case, the plaintiff is in a much better financial condition than defendant. Thus, plaintiff is not entitled to an award of attorneys' fees.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY POSTPONING DIVISION OF THE DEFENDANT'S PENSION UNTIL THE DEFENDANT'S CHILD SUPPORT OBLIGATION IS TERMINATED.

Plaintiff devotes much of her argument on the retirement fund issue to establishing that, under Utah law, the fund is property that must be considered by a trial court in determining what constitutes an equitable division of property. *See* Brief of Appellant at pp. 12-13. That argument is unnecessary for purposes of this appeal as that trial court ruled that the pension fund is an asset that should be divided between the parties (R. 203; R. 215). The defendant does not dispute that ruling and, in fact, conceded at trial that he was willing to give up his interest in the parties' house and to claim no interest in the funds inherited by the plaintiff during the marriage in return for being awarded his pension fund, because he needed the income from the pension to live and to provide support for his children (*See* R. 239, Tr. July

27, 1987 at pp. 31-32 and 71-72). Thus, although the defendant asked that the pension be awarded to him as an income stream and not divided as an asset, the defendant acknowledged that the court should consider the pension in determining an equitable property division.

The real issue in this appeal is whether the trial court erred in postponing division of the pension fund until termination of the defendant's child support obligation. The plaintiff argues that, because the defendant's interest in the pension was vested at the time of divorce and he was receiving monthly pension payments, the trial court was required, under *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982) and *Marchant v. Marchant*, 743 P.2d 199 (Utah Ct.App. 1987), to award the plaintiff one-half of 7/8ths of each monthly pension payment (approximately $645.00 gross or $503.00 net) from and after the time of the divorce. Brief of Appellant at pp. 14-15. Neither *Woodward* or *Marchant*, nor the more recent pronouncements on the subject found in *Maxwell v. Maxwell*, 82 Utah Adv. Rep. 19 (Utah Ct. App. May 6, 1988), *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988) and *Bailey v. Bailey*, 745 P.2d 830 (Utah Ct.App. 1987) place such a restriction on the trial court's discretion in dividing a pension fund.

Under Utah law, there is no question that retirement benefits, whether vested or not, "are a form of deferred compensation which a court should at least consider when dividing marital assets." *Gardner*, 748 P.2d at 1078. As noted above, the defendant

acknowledged at trial that the court could consider his pension in determining how to divide the parties' assets.

In *Gardner*, the Utah Supreme Court noted that a trial court has at its disposal many different methods of dividing a pension plan, any one of which may be appropriate depending upon the circumstances of the case. 748 P. 2d at 1079. For instance, the Court approved use of the *Woodward* formula, where other assets are inadequate to offset the value of the pension or the present value of the pension is impossible to calculate. *Id. citing Woodward*, 656 P. 2d at 433. The Court also approved of a division method requiring the spouse awarded the pension to make yearly installment payments that compensate the other spouse for his or her equitable share of the fund, *Id. citing Rayburn v. Rayburn*, 748 P. 2d 238 (Utah Ct. App. 1987), or awarding the entire pension to the retired spouse and awarding property of equal value to the other spouse. *Id. citing Dogu v. Dogu*, 652 P. 2d 1308 (Utah 1982). In short, the *Woodward* formula is not the only method of dividing a pension fund. *See Maxwell* 82 Utah Adv. Rep. at 15.

The question remains: Did the trial court abuse its discretion by postponing division of the pension fund and considering the interim pension income in determining the defendant's support obligation? The plaintiff argues that the court erred because the award is tantamount to postponing the income from a bank account and allowing one spouse to use the income therefrom for support-essentially forcing the plaintiff to underwrite the defendant's support obligation, which, the plaintiff infers, is obviously

impermissible. Brief of Appellant at pp. 13-14. The Defendant disputes that it is *per se* error to postpone division of property to allow one spouse temporary use of that property. It is not uncommon for a court to award a home to one spouse although the other spouse is entitled to a share of the equity in the house that will not be satisfied until the home is sold. *See e.g. Andersen v. Andersen*, 85 Utah Adv. Rep. 17, 18 (Utah Ct. App. June 22, 1988) Moreover, the Utah Supreme Court has acknowledged that one spouse may be awarded a pension fund as a *res* from which alimony can be paid. *Dogu*, 652 P. 2d at 310. There is no reason for distinguishing this case and holding that a spouse may not be temporarily awarded pension income from which he can pay child support.

The only real constraint on the trial court's discretion in dividing a pension, especially in an unusual manner such as the method of division used in the case at bar, is that the trial court must set forth finding that justifies the method of division. *See Bailey v. Bailey*, 745 P. 2d at 833 (holding that, when it is impossible to determine the present value of a pension, division should be postponed until the spouse accumulating the pension is entitled to distribution thereof unless the court sets forth reasons for immediately dividing the pension along with other assets).

In the instant case, the trial court found that the defendant's net monthly income apart from the pension payment, was only a net of approximately $200.00 per month (Findings and

Conclusions at pp. 2-3, para. 7). The court found that the plaintiff has a gross monthly income of $2,205.00 and awarded the plaintiff her inheritance and the appreciation on that inheritance (Findings and Conclusions at pp. 10-11, para. 37). The court ordered the defendant to pay a total of $525.00 per month as child support and noted that the amount was set taking into account the pension income that the defendant would receive (Findings and Conclusions at pp. 6 and 11, paras. 5 and 35).

Those findings indicate that, if the pension income is immediately divided using the *Woodward* formula, the defendant will have a monthly income of approximately $850.00 and the plaintiff will take home approximately $2,300.00 per month, in addition to the income that she can earn off her sizable inheritance. Certainly, under that scenario, the defendant would not be able to provide any significant support for his children and may well be entitled to receive alimony from plaintiff to prevent him from becoming a public charge and allow him to live, as nearly as possible, in the manner that the parties enjoyed in their 17.5 years of marriage, financially supporting the family.[2] That result would be less than equitable in view of the years of service rendered by the defendant. In short, the trial court postponed division of the pension to permit the defendant to use the income

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[2] The plaintiff drilled the defendant on why a man with an M.B.A. and a degree in engineering could not make more money after retiring from the military. (R. 239, Tr. July 27, 1987 at p. 90.) She did not suggest what he could do with his 20 year old West Point degree or his 10 year old M.B.A. to earn more money outside the military.

for a short time to begin a new career (something that he no doubt anticipated doing when he decided to stay in the military long enough to receive his pension), while still enabling him to provide support for his children - not an unjust result.

If this Court determines that the trial court erred in not dividing the pension using *Woodward* formula and, at the same time, requires the defendant to meet the support obligation ordered by the trial court, the defendant will be left with approximately $300.00 per month upon which to live and the plaintiff will receive over $2,700.00. That result is obviously unfair. Thus, as the plaintiff acknowledges, *see* Brief of Appellant at p. 16, if the trial court orders immediate division of the pension income, this case should be remanded to the trial court for modification of the child support award and an award of alimony that will allow the defendant to live, as nearly as possible, in the style that he enjoyed prior to the divorce.

POINT II

A TRIAL COURT MAY ORDER A CUSTODIAL PARENT TO EXECUTE DOCUMENTS NECESSARY FOR THE NONCUSTODIAL PARENT TO CLAIM ONE OR MORE OF THE PARTIES' CHILDREN AS A TAX EXEMPTION.

Almost a year after the instant case was decided, this Court, in *Martinez v. Martinez*, 754 P.2d 69 (1988), ruled that a post-1985 divorce decree did not constitute a "qualified pre-1985 instrument" pursuant to which a non-custodial parent can claim a tax exemption for his or her child under 26 U.S.C. §152(e)(4) (1988), although the divorce decree modified a pre-1985 stipulation that allowed the

non-custodial parent to take the exemptions. *Id.* at 72. The Court held that, because the non-custodial parent had not established that he fell within any of the statutory exceptions to the general rule that the custodial parent is also entitled to claim exemptions for the parties' children, the trial court erred in awarding tax exemptions to the non-custodial parent. *Id.*

The existence of a "qualified pre-1985 instrument" that allocates a tax exemption to the non-custodial parent is not the only exception to the general rule that a custodial parent is entitled to claim the parties' children as a tax exemption. A non-custodial parent is entitled to the exemption if: (1) the custodial parent signs a written declaration that he or she will not claim the child as an exemption; and (2) the non-custodial parent attaches that written declaration to his or her tax return. 26 U.S.C. §152(e)(2). In short, a non-custodial parent can claim an exemption if the custodian executes a written waiver of the right to claim the child.

In interpreting and applying the waiver exception, state courts have established two lines of reasoning, which lead to opposite results. One line of reasoning simply finds that because a federal statute grants the exemptions to the custodial parent, state courts cannot change that result by ordering the custodial parent to execute a waiver of the exemption. *Jensen v. Jensen*, 753 P.2d 342, 345 (Nev. 1988)(holding that it is improper for a trial court to order the custodial parent to execute a waiver when the same economic result could be achieved by decreasing the non-

custodial parent's support obligation); *Lorenz v. Lorenz*, 419 N.W.2d 770, 771 (Mich. Ct.App. 1988)(holding that a state court has no jurisdiction over which party can claim a child as a tax exemption but noting that, where the level of support was determined in conjunction with allowing the non-custodial parent to claim children as tax exemptions, it is appropriate for a trial court to decrease the amount of support if the non-custodial parent refuses to waive the exemptions). *Davis v. Fair*, 707 S.W.2d 711 (Tex.Ct.App. 1986) (again holding that where a non-custodial parent is denied an exemption under 26 U.S.C. §152, it is appropriate to decrease the amount of support paid by that parent).

The better view, and the view adopted by the majority of courts that have addressed the issue, is that, although a state court cannot award tax exemptions simply by ordering who is entitled to the exemptions, the court may order a custodial parent to execute the waiver necessary for a non-custodial parent to claim the exemptions under 26 U.S.C. §152(e)(2). *Hughes v. Hughes*, 35 Ohio 165; 518 N.E.2d 1213 (1988); *Pergolski v. Pergolski*, 143 Wis.2d 166, 420 N.W.2d 414 (Ct.App. 1988); *Cross v. Cross*, 363 S.E.2d 449 (W.Va. 1987); *Theroux v. Boehmler (In re the Marriage of Theroux)*, 410 N.W.2d 354 (Minn.Ct.App. 1987); *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13 (Ct.App. 1987); *Fudenberg v. Molsted*, 390 N.W.2d 19 (Minn.Ct.App. 1986). The reasoning behind that view is as follows:

Prior to 1984, 26 U.S.C. §152(e) stated that the parent who provided the larger share of support to a child could claim the

child as an exemption and the non-custodial parent was *presumed* to provide the larger share of support if he or she paid more than $1,200.00 per year as child support. As a result of that rule, the Internal Revenue Service was forced to resolve disputes between parents over who actually provided more support for the child. In order to relieve the I.R.S. from the burden of resolving these domestic disputes, 26 U.S.C. §152(e) was amended to establish, conclusively, that the custodial parent is entitled to claim a child as an exemption, unless one of the statutory exceptions is present. *See e.g. Pergolski*, 420 N.W.2d at 417; *Cross*, 363 S.W.2d at 449; *Lincoln*, 746 P.2d at 16. Nowhere in the amended Section 152(e) is a state court prohibited from ordering a party to execute the waiver necessary to allow a non-custodial parent to claim a child as an exemption under the exception provided in §152(e)(2). Allowing the state court to issue such an order does not impede the goal of the statute - the I.R.S. is still not required to resolve disputes about who is entitled to the exemption. *See e.g. Cross*, 363 S.E.2d at 458-59. Further, such an order may promote the interest of the custodial parent. The state court can order the custodial parent to execute a waiver, only if the non-custodial parent remains current in his or her support obligations, which gives the custodial parent some leverage to assist in collecting past-due child support when the defaulting parent desires to file a tax return. *See e.g. Cross*, at 459-60. On the other hand, prohibiting a trial court from issuing such an order may prevent the court from promoting the parties' interest by awarding the

exemption to the party with the highest income - rendering more disposable income available for support of the parties and their children. *Id.* at 460.

In short, permitting a state court to order a custodial parent to execute the waiver necessary to allow a non-custodial parent to claim a child as an exemption does not conflict with federal law and may promote the interest of the state and the custodial parent in enforcing a child support obligation. Consequently, a trial court should be permitted to order a custodial parent to execute the waiver required to allow the non-custodial parent to claim a child as a tax exemption.

In the instant case, the defendant was awarded an exemption for one of the parties' children, so long as he is current in his child support payments, and the plaintiff was ordered to execute the documents required by the I.R.S. to effectuate that award (Decree at p. 2, para. 6). In accord with the points and authorities presented above, that order should be affirmed. Alternatively, if this Court finds that the trial court cannot order the defendant to execute a waiver of the tax exemption, the case should be remanded to permit an adjustment in child support to reflect the loss of disposable income that the defendant will incur by losing the tax exemption.

POINT III

THE APPRECIATION IN MONEY INHERITED BY ONE SPOUSE DURING A MARRIAGE SHOULD BE CONSIDERED IN DETERMINING AN EQUITABLE DIVISION OF PROPERTY IN A DIVORCE PROCEEDING WHEN THE APPRECIATION IS DUE TO THE SERVICE RENDERED BY THE OTHER SPOUSE.

In the instant case, the uncontroverted evidence indicates that during the marriage, the plaintiff gave the defendant $80,000.00 of the $140,000.00 she inherited and the defendant invested that money and generated a return of approximately $32,384.00 (R. 239; Tr. July 27, 1987 at pp. 48-49 and 69). Consistent with that evidence, the trial court ruled that the $32,384.00 was attributable, in part, to the defendant's services. Yet the trial court ruled that the $32,384.00 was not a marital asset that was subject to division between the parties (Findings and Conclusions at p. 5, 12 and 15, paras. 14, 26 and 37).

The general rule of law governing division of one spouse's inheritance in a divorce proceeding is that it "may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property. . . . However the rule is not invariable." *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987). In determining whether it is appropriate to divide an inheritance in a divorce proceeding, a trial court must consider a number of factors including the factors that must be considered when dividing any property, marital or otherwise, such as: the type of property involved, the length of the marriage; and the parties'

respective financial position. *Id.* A trial court may award one spouse his or her entire inheritance and the appreciation thereto if the award is equitable, especially if the other spouse has not contributed to the appreciation in the property. *Id.* at 136; *see also Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987) (holding that a trial court properly awarded one spouse the amount that she invested into the parties' home from her inheritance, in view of the fact that the appreciation in the house was divided equally between the parties).

However, "of particular concern" in a case in which an inheritance and associated appreciation is at issue is "whether one spouse has made any contribution toward the growth" of the other spouse's inherited property. *Burke*, 733 P.2d at 135. Thus, where the parties' property consists primarily of gifts obtained from one spouse's parents and the appreciation on those gifts earned through investments made by the other spouse, it is appropriate to consider the appreciation as marital property that should be divided between the parties. *See Dubois v. Dubois*, 29 Utah 2d 75, 504 P.2d 1380, 1381 (1973).

In the instant case, the circumstances dictate that, at minimum, the appreciation on the plaintiff's inheritance that is attributable to the defendant's investments should have been considered as property to be divided between the parties. The facts in this case indicate that the plaintiff has only a Volkswagen Jetta to show for the $60,000.00 that she inherited but did not give the plaintiff to invest. She could not account for the

remainder of the funds. Yet, the $80,000.00 invested by the defendant earned a return of almost 50% leaving the plaintiff with over $110,000.00 at the time of the divorce. Certainly, a spouse should not be discouraged from protecting and enhancing property that the other spouse receives through gifts, inheritance or otherwise by being denied the benefit of his or her services if the marriage ends in divorce.

The impracticality and inequity that would result if, as a general rule, a spouse is not entitled to share in appreciation of the other spouse's property when the appreciation is attributable to his or her services, is compounded in the instant case. In this case, the plaintiff's inheritance came towards the end of a long marriage, after the most valuable separate property of the defendant, his West Point degree, had largely been expended and had allowed the parties' to acquire an estate worth nearly $200,000.00. As a result of the late inheritance, the plaintiff leaves the marriage with very good financial resources, while the defendant's resources are only moderate--at a time when he is trying to start a new career.

Under these circumstances, the trial court erred in refusing to consider the appreciation in the plaintiff's inheritance as an asset which should be considered in dividing property between the parties.

POINT IV

THE PLAINTIFF IS NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES FOR THIS APPEAL.

The plaintiff correctly argues that Utah Code Ann. §30-3-3 (1984) authorizes a court to award attorney's fees in a divorce action and that this may include attorney's fees for an appeal. However, as this Court has ruled, an award of attorney's fees under Utah Code Ann. §30-3-3 must be "based on evidence of both financial need of the party and the reasonableness of the fee awarded." *Andersen v. Andersen*, 85 Utah Adv. Rep. at 19. As noted above, the plaintiff leaves the parties' marriage in a much better financial position than does the defendant. She has both a higher monthly income than the defendant and, thanks to her inheritance, a much greater financial reserve. Under these circumstances, if there is to be an award of attorney's fees, it should be to the defendant.

Plaintiff erroneously argues that she is entitled to attorney's fees because the defendant urged the trial court to award him his retirement as an "income stream". As indicated in Point I *infra* the defendant conceded that the pension should be considered in a division of the parties' property and in fact offered to give up his interest in the parties' home and the appreciation in the plaintiff's inheritance if he was awarded the pension as an income stream because he needed the income to live. The trial court ruled that the pension was indeed an asset subject

to division between the parties but postponed division of the fund to allow the defendant to use the income to support himself and his children - an equitable determination that fell somewhere between what the defendant and the plaintiff had requested.

The plaintiff's argument that there is some reason to award attorney's fees on the basis of the defendant's cross-appeal is simply incomprehensible. Attorney's fees should not be awarded where one party appeals in good faith. *See e.g. In the Matter of the Marriage of Milanovich*, 697 P.2d 927, 928 (Mont. 1985). In this case, the defendant decided to ask the Court to rule on division of the appreciation in the inheritance only after the plaintiff had already appealed the case to this court. The law in Utah is unclear on division of appreciation in the property of one spouse that is attributable to the services of the other spouse. Moreover, the law that exists indicates that such appreciation should be considered as property to be divided between the parties.

Consequently, the plaintiff's request for fees and costs on appeal should be denied.

CONCLUSION

Based upon the foregoing points and authorities, the defendant respectfully requests that this court:

(1) Affirm the trial court's ruling, which postpones division of the defendant's pension until his child support obligation terminates; and

(2) Affirm the trial court's order awarding defendant a tax exemption for one of the parties' children and requiring the

plaintiff to execute the documents necessary to effectuate that order; or,

If this court reverses the trial court's ruling on either the pension or the tax exemption, defendant requests that this case be remanded to the trial court for a modification of support and alimony that will leave the defendant with sufficient income to support himself.

In addition, the defendant requests that this court reverse the trial court's determination that the appreciation in plaintiff's inheritance is not property that should be divided between the parties and remand the case to the trial court for an equitable division of the appreciation.

Finally, the defendant requests that plaintiff's request for fees and costs on appeal be denied.

DATED this 16th day of August, 1988.

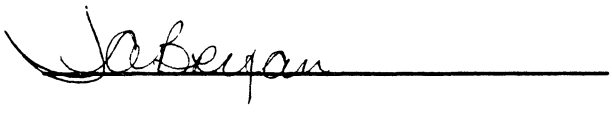
COHNE, RAPPAPORT & SEGAL

DAVID S. DOLOWITZ
JULIE A. BRYAN
Attorneys for Respondent/Cross Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 1988, I caused to be mailed four true and correct copies of the foregoing, postage prepaid, to:

KENT M. KASTING
DART, ADAMSON & KASTING
310 South Main
Suite 1330
Salt Lake City, Utah 84101



(td/jab/motes.bri)

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * * * * * *

BARBARA MOTES, Plaintiff, vs. PRESTON MOTES, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. D86-1615 Judge Kenneth Rigtrup

* * * * * * * * *

The above-entitled matter came before the court for trial on Thursday, the 30th day of July, 1987, the Honorable Kenneth Rigtrup presiding. The plaintiff was present in person, representing herself. The defendant was present in person and represented by counsel, David S. Dolowitz. The court discussed the issues with the parties to see what could be resolved by agreement, then heard and considered the testimony of the parties, examined the exhibits offered by the parties, and, being advised in the premises, now makes and enters the following as its

EXHIBIT A

FINDINGS OF FACT

1. The parties were both residents of Salt Lake County, State of Utah, on the date this action was filed and each had been so for more than three months immediately prior thereto.

2. The parties are husband and wife, having been married February 11, 1967, in Ardmore, Pennsylvania.

3. There have been four children born as issue of this marriage, three of whom, Kimberly, age 16, born October 19, 1970; Tamara, age 14, born October 5, 1972; and Charissa, age 13, born December 27, 1973, are minors.

4. The parties agreed that care, custody and control of the minor children of the parties should be awarded to the plaintiff, subject to liberal rights of visitation by the defendant.

5. The plaintiff is 44 years of age, is presently employed as a nursing supervisor, where she supervises more than 650 employees at the University of Utah Hospital and earns a gross income of $2,205.00 per month.

6. The plaintiff acquired her nursing education during the course of the marriage.

7. The defendant is 45 years of age, a graduate of the United States Military Academy at West Point and has an M.B.A. earned from the University of Utah acquired during the marriage. He is presently retired from the United States Military and receives $1,484.00 a month as retirement pay. In

addition, he receives $315.00 a month as payment on a note for the sale of property owned by the parties in El Paso, Texas, and has earned, on an average basis, commissions from his employer, Waddell & Reed, as a financial planner, $248.00 a month. He has incurred expenses in conducting his business at Waddell & Reed of approx. $330.00 a month.

8. In February, 1985, the plaintiff's father died. When the parties went to the home that he had occupied, they found and removed from the home $30,000.00 in cash. The plaintiff's father made plaintiff his sole heir and she has inherited the said $30,000.00 in cash at the time of her father's death, $100,000.00 in December, 1985; $7,500.00 in November, 1986; and $3,000.00 in December, 1986, for a total of $140,500.00. The estate has not been finally distributed, but most of it has been disbursed.

9. After the parties removed the $30,000.00 from the plaintiff's father's home, $20,000.00 was given to the defendant by the plaintiff to invest for their children and accounts were opened up in the sum of $5,000.00 for each of the four children of the parties. After the $100,000.00 payment had been received, an additional $10,000.00 was set aside for each of the children of the parties. There are, now, $15,000.00 plus earnings in the accounts of each of the children of the parties for a total of $60,000 plus earnings.

10. The parties acquired a home and real property at 1516 South Wasatch Drive, Salt Lake City, Utah, in which they have accumulated an equity of ~~$30,423.00~~ KR approximately $38,900.00; a note from the sale of property in El Paso, Texas, valued at $35,000.00; IRA accounts, in the United Funds, $17,350.00; Continental, $8,000.00; Magelland Fund, $19,083.00; stock accounts in the Fidelity Destiny Fund, $41,263.00; shares of stock in AT&T and the other Bell companies plus accumulated reinvested dividends presently valued at $3,800.00; an account at Wilson-Davis for various penny stocks valued at $50.00; a 1980 Oldsmobile, valued at ~~$300.00~~ KR. approximately $1,000; a 1982 Volvo automobile, valued at ~~$1,300.00~~ KR. approximately $6,500.00; a 1986 Jetta automobile, valued at $7,000.00 KR. which was secured through inheritance funds of Plaintiff; a fund for payment of taxes in the Vanguard Fund of approximately $1,149.00; and an Army Mutual Aid Insurance Policy with a present cash value of $3,100.00.

11. The plaintiff has a retirement account through her employment at the University of Utah Hospital with a ~~present~~ KR current balance ~~value of~~ KR. approximating $5,129.00; her own checking account at the Credit Union for the balance of $7,680.00, and a Pentagon Credit Union Account with a balance of $3,721.00.

12. The defendant has a savings account at the Air Defense Center Credit Union of $375.00; a checking account through the Air Defense Center Credit Union of $1,000.00; a Pentagon Credit Union Account of $275.00; and checking account at First Security Bank of $500.00.

13. The parties have fought for a substantial period of time and have demonstrated that there are irreconcilable differences between them in terms of their goals, values and how they treat each other, which make continuation of their marriage relationship impossible.

14. The defendant invested a portion of the money inherited by the plaintiff and KR. those ~~his~~ investments have produced earnings KR. approximating ~~of~~ $32,384.00.

15. Both of the parties disposed of assets during the pendency of this matter.

16. The plaintiff is presently enrolled in school, as well as being employed and hopes to obtain a Master's Degree which she believes will be necessary to further her nursing career.

17. The court discussed with the parties division of their personal property from a list prepared by the defendant and they agreed to divide the personal items between them as is hereinafter set out.

18. The plaintiff desires that her KR. former name be KR. restored ~~changed~~ to Barbara Van Asdlan.

19. Each of the parties employed counsel to represent them in this matter. Counsel for the plaintiff withdrew shortly before the trial and the plaintiff chose to represent herself, rather than employ new counsel.

From the foregoing Findings of Fact, the court now makes and enters the following

CONCLUSIONS OF LAW

1. Each of the parties should be awarded a Decree of Divorce from the other, said Decrees to become final upon entry.

2. Care, custody and control of the minor children of the parties should be awarded to the plaintiff, subject to liberal rights of visitation by the defendant.

3. The defendant and the children are to work out their own visitation arrangements upon 24-hour advance notice with which the plaintiff should not interfere.

4. Each of the parties should be enjoined and prohibited from ~~denegrating~~ KR - denigrating the other to the children or taking any action to involve the children in their disputes. Each should be supportive of the other as the parent of the children.

5. The defendant should be ordered to pay the sum of $175.00 per child per month as child support for each of the children until that child attains the age of 18 and/or graduates from high school with his or her age-appropriate class. The defendant should be enjoined from placing any initials or comments on the checks, KR. except to identify as child support. One-half of the child support should be paid on or before the 5th of each month and one-half should be paid on or before the 20th of each month. This order regarding child support should become effective August 1, 1987.

6. The defendant should be awarded the youngest child of the parties, Charissa, as his tax dependent, and the plaintiff should be ordered to sign all documents required by the Internal Revenue Service to effect this award.

7. All child support payments from and after the entry of the Decree of Divorce in this matter should be made through the clerk of the Salt Lake County Court.

8. A withhold and deliver order should be authorized to be executed should the defendant fall more than 30 days behind in the payment of his child support.

9. Each of the parties is awarded $1.00 per year as alimony from the other.

10. Each of the parties should be ordered to retain their existing life insurance policies for the minor children of the parties until child support for the youngest child terminates.

11. Each party should be ordered to maintain such health, accident, dental, orthodontic and hospital insurance as they have available to them through their employment for the benefit of the minor children of the parties for so long as they may provide such insurance protection under the terms and conditions of the applicable insurance policies and each should be ordered to pay one-half of any uninsured medical, dental, hospital or orthodontic expenses.

12. The plaintiff should have her name K.R. restored ~~changed~~ to the name of Van Asdlan.

13. Each of the parties should be ordered to sign all documents and take all actions necessary to effect the provisions of the Decree of Divorce.

14. The agreement of the parties regarding division of their personal property should be accepted by the court and, accordingly, the defendant is awarded, and the plaintiff should be ordered to deliver to the defendant, the following items:

a. The bedroom set located in the master bedroom, including the king-sized bed, chest, dresser, mirrors and nightstands;

b. One of the large down comforters;

c. His West Point blanket;

d. The two table lamps with the tripod-type base;

e. The sofa and loveseat located in the family room;

f. The glass-topped table in the family room used as an endtable for the sofa;

g. The clay table lamp on the glass-topped table;

h. The large Sand painting given as a birthday present to the defendant;

i. The Frace eagle over the fireplace;

j. The Ray Harm eagle print;

k. The silver West Point plate;

l. The two pen and ink drawings of Landstuhl;

m. The West Point print;

n. The "Old Man" painting;

p. Six of the etchings;

q. The Merimbege River painting;

r. Two of the Hughes paintings;

s. Two large Sansui speakers;

t. Two channel tape drive;

u. Two Kenwood speakers;

v. Pioneer tuner;

w. Phonograph turntable;

x. AKAI tapedeck (two channel);

y. Two of the three wall clocks;

z. Apple computer, printer and software;

aa. The flower set of Franciscan china;

bb. The Sango china;

cc. The set of Nachmann whisky beakers;

dd. The Rosenthal crystal;

ee. Copper pots and pans;

ff. Pewterware; plates, cups, goblets, pitcher, steins;

gg. Table linens to include one of the Army-Navy tableclothes;

hh. Desk in the laundry room;

ii. The old green table from "Pops;"

jj. One cardtable with one round piece of glass and one rectangular piece;

kk. The Flokoti rugs and brass samovar;

ll. The National Geographic books and magazines and the bookcase in the study;

mm. Handtools and power tools;

nn. The aquarium;

oo. All of Defendant's personal clothing and items, including uniforms;

pp. All items purchased by Defendant before marriage to include textbooks and records;

qq. Remainder of the flatware set;

rr. Balance of Defendant's business records.

ss. Large china hutch obtained from P. D. O. in Germany;

15. The plaintiff should be specifically awarded

a. The Gieol painting;

b. Two Bassett paintings;

c. The four-channel tape drive;

d. Two bookcase speakers (Pioneer);

e. SANSUI tuner;

f. Grundig console and six speakers;

g. AKAI tape deck (larger);

h. Cassette deck;

i. One of the three wall clocks;

j. Pewter candlesticks;

k. French hutch;

l. Twelve Hummel figurines;

m. One set of tools for use around the house; K.P. including a power drill, if

16. The defendant should be ordered to make available to the plaintiff any records that the plaintiff shall request so that they can be reproduced on a cassette, K.R. or, provided there is equipment capability, reproduce onto blank tapes provided by Plaintiff.

17. Each of the parties should be awarded all items of personal property in his/her possession not hereinabove specified.

18. The defendant should be ordered to make available to the plaintiff any pictures, photographs or slides which she wishes duplicated and those will be duplicated at her expense.

19. The plaintiff should be awarded all of the accounts of the children established with funds from the plaintiff's inheritance and the right and obligation to manage those accounts, and the defendant should be ordered to take appropriate steps to turn those over to the plaintiff.

20. All right, title and interest in the home on Wasatch Drive should be awarded to the plaintiff, free of any interest of the defendant, subject to her payment of the first mortgage and payment of the debt and obligation of approximately $4,000.00 due to the Pentagon Credit Union and approximately $3,500.00 to the Norwest Credit Union. The plaintiff should be responsible for these obligations from and after August 1, 1987, and should be ordered to hold the defendant harmless therefrom.

21. The Trinidad note should be awarded to the defendant, free and clear of any claim of the plaintiff.

22. Each of the parties should be awarded one of the Horizon lots which have no present value.

23. The defendant should be awarded the interest of the parties in the United funds IRA Account; the Fidelity Destiny Fund; the Wilson-Davis Account; the Army Mutual Aid Insurance Policy; the Air Defense Center Savings account; the Air Defense Center checking account; his Pentagon Credit Union account; and Defendant's First Security checking account.

24. The plaintiff should be awarded the Continental IRA account; the Magellan fund; the family AT&T stock; her accounts at the University of Utah Credit Union; and Plaintiff's Pentagon Credit Union account.

25. The defendant should be awarded the 1980 Oldsmobile and the plaintiff should be awarded the 1982 Volvo and the 1986 Jetta.

26. The K.R. approximate amount of $32,384.00 earned ~~by the defendant through his management of~~ K.R. on the property inherited by the plaintiff should be considered a non-asset of the marriage.

27. The defendant shall obtain from Sears a statement of the account balance due as of May 1, 1986. He is credited with having paid $140.00 on that account. Each of the parties shall be obligated to pay one-half of that account balance. If, after deduction of the $140.00 paid by the defendant, there is any money due below $140.00, that should be paid by the plaintiff. If the amount due, after credit of the $140.00 is more

than $140.00, the defendant should pay that sum to the plaintiff or judgment shall be entered in her favor for one-half of the balance over $280.00. If the defendant, by paying $140.00 shall have paid more than one-half of the amount that was due on May 1, 1986, the amount by which he has exceeded payment of one-half of the balance due should be a credit against the child support he shall have been ordered to pay.

28. If there are orthodontic bills due which have not been paid by insurance, each of the parties should pay one-half of that unpaid balance and one-half of any counseling bills incurred for and on behalf of the children. If there is a bill for counseling for the defendant, he should pay it himself.

29. The defendant should be ordered to pay the obligations due to MasterCharge and First Security Bank and to hold the plaintiff harmless therefrom.

30. Each of the parties should assume, pay and hold the other harmless from any debts or obligations incurred since their separation.

31. Each of the parties should assume and pay their own costs and fees as incurred in this matter.

32. The request of the plaintiff that her fees be paid by the defendant should be denied, as she has substantial resources of her own to pay her own fees.

33. The defendant should be ordered to verify that all of the checks he testified he has transmitted to the plaintiff

shall have cleared the bank and been paid to her. If he determines that they have not cleared the bank, then, he should be ordered to put stop orders against those checks and write replacement checks.

34. Each of the parties should be enjoined and prohibited from physically abusing, harassing, bothering, or attempting to intimidate the other in any way, wherever they may be or reside.

35. The court, recognizing that the plaintiff claims that the military retirement pay of the defendant is an asset which should be divided which is disputed by the defendant who contends that the fund is an income stream, not an asset because it is being paid to him, and that the court has determined that the defendant receives $1,484.00 as retirement pay, plus the income found in Finding # 7 above upon which the court has set the child support obligation of the defendant in light of that obligation as well as the fact that the plaintiff has accrued a retirement account through the State of Utah which has a present value of $5,129.00, rules final disposition as to an award regarding either of the retirement accounts of the parties should be reserved until the obligation to pay child support terminates.

36. The court declares that it believes that it has divided the property of the parties with approximately $87,707.00 being awarded to the plaintiff and approximately $99,913.00 being awarded to the defendant, exclusive of household furniture and goods and personal property not otherwise valued,

and the extra amount has been awarded to the defendant for financial services provided to the plaintiff and the marital estate.

37. The court has determined that it should award to the plaintiff the funds that she has inherited without counting that as part of the marital estate, although the defendant has requested that this be included for consideration purposes and that part of it, that is, the money that has been earned from the inheritance (RP. in part) through the management of the defendant be considered as a marital asset.

DATED this 19th day of December, 1987.

KENNETH RIGTRUP
District Court Judge

H. DIXON HINDLEY
CLERK
By _____
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to the following on this 16th day of September, 1987:

Ms. Barbara Van Asdlan
1516 South Wasatch Drive
Salt Lake City, Utah

David S. Dolowitz
DAVID S. DOLOWITZ

DSD:080487K

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * * * * *

Bk 213 No 6572
12-21-87-8:33am.

BARBARA J. MOTES, Plaintiff, vs. PRESTON J. MOTES, Defendant.	DECREE OF DIVORCE Civil No. D86-1615 Judge Kenneth Rigtrup

* * * * * * * *

The above-entitled matter came before the court for trial on Thursday, the 30th day of July, 1987, the Honorable Kenneth Rigtrup presiding. The plaintiff was present in person and representing herself. The defendant was present in person and represented by counsel, David S. Dolowitz. The court discussed the issues with the parties to see what could be resolved by agreement, then heard and considered the testimony of the parties, examined the exhibits offered by the parties, and, being advised in the premises, and having made and entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

EXHIBIT B

1. Each of the parties is awarded a Decree of Divorce from the other, said Decree to become final upon entry.

2. Care, custody and control of the minor children of the parties is awarded to the plaintiff, subject to liberal rights of visitation by the defendant.

3. The defendant and the children shall work out their own visitation arrangements upon 24-hour advance notice with which the plaintiff shall not interfere.

4. Each of the parties is enjoined and prohibited from ~~denigrating~~ KR: denigrating the other to the children or taking any action to involve the children in their disputes. Each shall be supportive of the other as the parent of the children.

5. The defendant is ordered to pay the sum of $175.00 per child per month as child support for each of the children until that child attains the age of 18 and graduates from high school with his or her age-appropriate class. The defendant is enjoined from placing any initials or comments on the checks, KR: except to identify as child support. One-half of the child support shall be paid on or before the 5th of each month and one-half shall be paid on or before the 20th of each month. This order regarding child support shall become effective August 1, 1987.

6. The defendant is awarded the youngest child of the parties, Charissa, as his tax dependent, KR: provided he is current in the payment of his child support at the end of the applicable period, and the plaintiff is ordered to sign all documents required by the Internal Revenue Service to effect this award.

7. All child support payments from and after the entry of the Decree of Divorce in this matter shall be made through the clerk of the Salt Lake County Court.

8. A withhold and deliver order is authorized to be executed, should the defendant fall more than 30 days behind in the payment of his child support.

9. Each of the parties is awarded $1.00 per year as alimony from the other.

10. Each of the parties is ordered to retain their existing life insurance policies for the minor children of the parties until child support for the youngest child terminates.

11. Each party is ordered to maintain such health, accident, dental, orthodontic and hospital insurance as they have available to them through their employment for the benefit of the minor children of the parties for so long as they may provide such insurance protection under the terms and conditions of the applicable insurance policies and each is ordered to pay one-half of any uninsured medical, KR. optical, dental, hospital or orthodontic expenses.

12. The plaintiff should be ~~changed~~ KR. restored to the name of Van Asdlan.

13. Each of the parties is ordered to sign all documents and take all actions necessary to effect the provisions of this Decree of Divorce.

14. The agreement of the parties regarding division of their personal property should be accepted by the court and, accordingly, the defendant is awarded, and the plaintiff should be ordered to deliver to the defendant, the following items:

a. The bedroom set located in the master bedroom, including the king-sized bed, chest, dresser, mirrors and nightstands;

b. One of the large down comforters;

c. His West Point blanket;

d. The two table lamps with the tripod-type base;

e. The sofa and loveseat located in the family room;

f. The glass-topped table in the family room used as an endtable for the sofa;

g. The clay table lamp on the glass-topped table;

h. The large Sand painting given as a birthday present to the defendant;

i. The Frace eagle over the fireplace;

j. The Ray Harm eagle print;

k. The silver West Point plate;

l. The two pen and ink drawings of Landstuhl;

m. The West Point print;

n. The "Old Man" painting;

p. Six of the etchings;

q. The Merimbege River painting;

r. Two of the Hughes paintings;

s. Two large Sansui speakers;

t. Two channel tape drives;

u. Two Kenwood speakers;

v. Sansui tuner;

w. Phonograph turntable;

x. La Caille tapedeck (two channel);

y. Two of the three wall clocks;

z. Apple computer, printer and software;

aa. The flower set of Franciscan china;

bb. The Sango china;

cc. The set of Nachmann whisky beakers;

dd. The Rosenthal crystal;

ee. Copper pots and pans;

ff. Pewterware;

gg. Table linens to include one of the Army-Navy tableclothes;

hh. Desk in the laundry room;

ii. The old green table from "Pops;"

jj. One cardtable with one round piece of glass and one rectangular piece;

kk. The Flokoti rugs and brass samovar;

ll. The National Geographic books and magazines and the bookcase in the study;

mm. Handtools and power tools;

nn. The aquarium;

oo. All of Defendant's personal clothing and items, including uniforms;

pp. All items purchased by Defendant before marriage to include textbooks and records;

qq. Remainder of the flatware set;

rr. Balance of Defendant's business records.

ss. Large china hutch obtained from P. D. O. in Germany;

15. The plaintiff is specifically awarded

a. The Gieol painting;

b. Two Bassett paintings;

c. The four-channel tape drive;

d. Two bookcase speakers (Pioneer);

e. SANSUI tuner;

f. Grundig console and six speakers;

g. AKAI tape deck (larger);

h. Cassette deck;

i. One of the three wall clocks;

j. Pewter candlesticks;

k. French hutch;

l. Twelve Hummel figurines; and

m. One set of tools for use around the house. K.R. - including a power drill if any

16. The defendant shall make available to the plaintiff any records that the plaintiff shall request so that they can be reproduced on a cassette, K.R. or provided there is equipment capability, reproduce onto blank tapes provided by Plaintiff.

17. Each of the parties is awarded all items of personal property in his/her possession not hereinabove specified.

18. The defendant is ordered to make available to the plaintiff any pictures, photographs or slides which she wishes duplicated and those will be duplicated at her expense.

19. The plaintiff is awarded all of the accounts of the children established with funds from the plaintiff's inheritance and the right and obligation to manage those accounts, and the defendant is ordered to take appropriate steps to turn those over to the plaintiff.

20. All right, title and interest in the home on Wasatch Drive is awarded to the plaintiff, free of any interest of the defendant, subject to her payment of the first mortgage and payment of the debt and obligation of approximately $4,000.00 due to the Pentagon Credit Union and approximately $3,500.00 to the Norwest Credit Union. The plaintiff shall be responsible for these obligations from and after August 1, 1987, and she is ordered to hold the defendant harmless therefrom.

21. The Trinidad note is awarded to the defendant, free and clear of any claim of the plaintiff.

22. Each of the parties is awarded one of the Horizon lots which have no present value.

23. The defendant is awarded the interest of the parties in the United funds IRA account, the Fidelity Destiny Fund, the Wilson-Davis Account; the Army Mutual Aid Insurance Policy, the Air Defense Center Savings account, the Air Defense Center

checking account, his Pentagon Credit Union account and his First Security checking account.

24. The plaintiff is awarded the Continental IRA account, the Magellan fund, the family AT&T stock, and her accounts at the University of Utah Credit Union and plaintiff's Pentagon Credit Union account.

25. The defendant is awarded the 1980 Oldsmobile and the plaintiff is awarded the 1982 Volvo and the 1986 Jetta.

26. The K.R. approximate amount of $32,384.00 earned ~~by the defendant through his management of~~ K.R. on the property inherited by the plaintiff is not considered an asset of the marriage.

27. The defendant shall obtain from Sears a statement of the account balance due as of May 1, 1986. He is credited with having paid $140.00 on the account. Each of the parties shall be obligated to pay one-half of the account balance as of May 1, 1986. If, after deduction of the $140.00 paid by the defendant, there is a balance due of less than $140.00, it shall be paid by the plaintiff. If the amount due, after credit of the $140.00 is more than $140.00, the defendant shall pay that sum to the plaintiff or judgment shall be entered in her favor for one-half of the balance over $280.00. If the defendant, by paying $140.00 shall have paid more than one-half of the amount that was due on May 1, 1986, the amount by which he has exceeded payment of one-half of the balance due shall be a credit against the child support he shall have been ordered to pay.

28. The court heard testimony about the possibility that bills for psychological counseling and orthodontic care remain unpaid, but evidence was not presented as to amounts which were sufficient for the court to make a firm determination.

Accordingly, IT IS ORDERED that, if there are orthodontic bills due which have not been paid by insurance, each of the parties shall pay one-half of that unpaid balance and one-half of any counseling bills incurred for and on behalf of the children. If there is a bill for counseling for the defendant, he shall pay it himself.

29. The defendant is ordered to pay the obligations due to MasterCharge and First Security Bank and to hold the plaintiff harmless therefrom.

30. Each of the parties shall assume, pay and hold the other harmless from any debts or obligations incurred since their separation.

31. Each of the parties shall assume and pay their own costs and fees as incurred in this matter.

32. The request of the plaintiff that her fees be paid by the defendant is denied, as she has substantial resources of her own to pay her own fees.

33. The court determined that there was a dispute regarding temporary support. The defendant is ordered to verify that all of the checks he testified he has transmitted to the plaintiff shall have cleared the bank and been paid to her. If

he determines that they have not cleared the bank, then, he is ordered to put stop orders against those checks and write replacement checks.

34. Each of the parties is enjoined and prohibited from physically abusing, harassing, bothering, or attempting to intimidate the other in any way, wherever they may be or reside.

35. The court, recognizing that the plaintiff claims that the military retirement pay of the defendant is an asset which should be divided which is disputed by the defendant who contends that the fund is an income stream, not an asset because it is being paid to him, and that the court has determined that the defendant receives $1,484.00 as retirement pay, K.R. plus the income found in Finding #7 above, upon which the court has set the child support obligation of the defendant in light of that obligation as well as the fact that the plaintiff has accrued a retirement account through the State of Utah which has a present value of $5,129.00 rules final disposition as to an award regarding either of the retirement accounts of the parties is reserved until the obligation to pay child support terminates.

36. The court declares that it believes that it has divided the property of the parties with K.R. approximately $87,707.00 being awarded to the plaintiff and K.R. approximately $99,913.00 being awarded to the defendant, K.R. exclusive of household furniture and goods and personal property not otherwise valued, and the extra amount has been awarded to the defendant for financial services provided to the plaintiff and the marital estate.

37. The court has determined that it should award to the plaintiff the funds that she has inherited without counting

that as part of the marital estate, although the defendant has requested that this be included for consideration purposes and that part of it, that is, the money that has been earned from the inheritance KR. in part through the management of the defendant be considered as a marital asset.

DATED this 19th day of December, 1987.

Kenneth Rigtrup

KENNETH RIGTRUP
District Court Judge

H. DIXON HINDLEY
CLERK

By _____
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Decree of Divorce to the following on this 16th day of September, 1987:

Ms. Barbara Van Asdlan
1516 South Wasatch Drive
Salt Lake City, Utah

David S. Dolowitz

DAVID S. DOLOWITZ

DSD:080487L

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